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Significant reporting and disclosure changes looming for NZ trusts

By Veronica Harley & Anna Zhang



Inland Revenue has released not one, but two consultation documents on the new reporting and disclosure requirements for domestic trusts which will apply from the 2021-22 income year. Essentially new standards for preparing minimum requirement financial statements for trusts are being introduced. In addition, the finer details on information (mostly around settlements and distributions) that must be disclosed when filing the annual tax return, as well as how Inland Revenue intend to administer these rules has been released.

One consultation paper is an Officials' issues paper released by Inland Revenue Policy and Regulatory Stewardship team ("[Reporting requirements for domestic trusts: where disclosure is required under the Tax Administration Act 1994](#)"). This item outlines the proposed minimum requirements for financial statements for trustees.

The other consultation paper is a draft operation statement issued by Inland Revenue's Tax Counsel Office ("[Reporting requirements for domestic trusts](#)"). This item outlines the Commissioner's approach to applying her new trust information gathering powers.

Given we are already past halfway through the 2021-22 income year, it is imperative that trustees consider these new rules and understand their new obligations.

Why the new rules and who is affected?

To support Inland Revenue's ability to assess compliance with the new 39% personal income tax rate and monitor the use of structures and entities by trustees, new trust disclosure rules were enacted under urgency late last year with no prior consultation. These new rules apply for the 2021-22 income year and onwards.

Inland Revenue suggests that as many as 180,000 domestic trusts will be affected by these new disclosure requirements.

Trustees of trusts with assessable income are generally within the scope of the rules, with a few exclusions, such as for trustees of non-active trusts, charitable trusts and foreign trusts. It is important to note that each trustee under the trust has the obligation to comply with the new disclosure rules. Where a trustee is not a New Zealand tax resident, the obligation falls to any New Zealand tax resident settlor of the trust. Our [March Tax Alert Article](#) has discussed some of the key implications of the rules which you may wish to recap.

Proposed minimum requirements for financial statements

The '[Reporting requirements for domestic trusts](#)' issues paper sets out the proposed financial reporting

requirements and information that financial statements must show. Once finalised, an Order in Council will be published to bring the rules into force.

There is a list of requirements the financial statements must comply with to meet the minimum standards. Nevertheless, Inland Revenue recognises this may add unintended burden onto “small trusts”, and so proposes a de minimis exception to provide partial relief to small trusts. These are trusts for which the trustee has not derived annual income in excess of \$30,000, or incurred annual expenditure in excess of \$30,000 during the income year, and the total value of trust assets does not exceed \$2 million within that income year. The table below shows the minimum standards and areas of partial relief for small trusts.

Inland revenue expects that 38% of trusts will qualify for the de minimis rules but is seeking feedback on the partial exemption requirements for “small trusts”.

Financial information to be included

The issues paper lists proposed information that must be shown in the financial statements. Broadly this will include a reconciliation between the financial statements and taxable income; a reconciliation of movements from opening to closing balances, on a line-by-line basis, of all beneficiary accounts and loans; a schedule of fixed

Reporting requirements	Domestic Trusts	Small Trusts with partial relief
A statement of financial position setting out all the assets, liabilities, and net assets of the trust at the end of the income year	●	●
A profit and loss statement showing income derived, and expenditure incurred, by the trust during the income year	●	●
Accounting principle of double entry method for recording financial transactions	●	●
Accrual accounting	●	
Disclosing amounts using the most appropriate valuation principle between tax values, historical cost, and market values	●	●
A statement of accounting policies	●	
Showing required information (discussed below) in the financial statements	●	●
Disclosing comparable figures for the previous income year (if applicable)	●	

assets and tax depreciation; and quite detailed information on transactions with associated persons. A trust will also need to include amounts from the financial summary form (IR 10), which generally applies to trusts with business income, as well as non-business assets and liabilities.

The issues paper makes it clear that trustees will be obliged to prepare and hold the financial statements, but that the

financial statements will not be required to be filed with the tax return. Instead they will need to be provided on request.

Additional trust information gathering power and disclosures to be made

The second document released for consultation is a draft operational statement [ED0235](#) which sets out the Commissioner’s approach to applying her new trust information gathering powers



The issues paper makes it clear that trustees will be obliged to prepare and hold the financial statements, but that the financial statements will not be required to be filed with the tax return. Instead they will need to be provided on request.

in section 59BA of the Tax Administration Act. The obligation to provide further information is in addition to the minimum financial statements requirement. Essentially this is the information that will be required to be disclosed when filing the tax return. This may include:

- A statement of profit and loss and statement of position in the prescribed form. Broadly, certain information from the financial statements will need be summarised in the prescribed form (currently either an IR 10 or IR 6/6B)
- The amount and nature of any settlements made from the 2021-22 income year onwards (except for settlement arising from minor services incidental to the activities of the trust)
- Details of settlors and of any settlements made on the trust during the 2021-22 income year or later income years, or whose details have not previously been supplied to the Commissioner
- Details of every beneficiary who receives a distribution from the trust during the 2021-22 income year or late income years, and the amount of the distribution
- Details of any persons who have a power to appoint or dismiss a trustee, add or remove a beneficiary or amend the trust deed
- Any other information required by the Commissioner

Beware the CIR can go back to the 2015 income year

When these rules were enacted late last year the Government also included a retrospective information gathering power which can allow the Commissioner to request the above trust information as far back as the 2014-15 income year. Inland Revenue figures that taxpayers are required to keep records for seven years after the end of the income year anyway so trustees should be able to provide this on request. The information need only be provided to the extent that the information is in the knowledge, possession, or control of the trustee.

What's next?

Submissions on the draft officials' issues paper can be submitted by 15 November 2021, and by 30 November 2021 for the draft operational statement. There is a lot of detail in these new proposals when both statements are viewed together. We note the draft operational statement on information required to be filed with the tax return is 46 pages alone.

Practically these rules will apply in the second quarter of next year as the 2022 tax returns start to be prepared. We expect that these new rules will result in increased compliance costs for trustees.

If you would like to make a submission or wish further information please contact your usual Deloitte advisor.

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Income tax implications for capital gains distributed to New Zealand beneficiaries through Australian discretionary trusts

By Joanne McCrae & David Watkins



We frequently see clients move to Australia without considering the implications for their New Zealand settled trusts. A recent Australian tax case has put the spotlight on such trusts which could have tax consequences for New Zealand resident beneficiaries in certain situations.

Distributions through a discretionary trust of current year income or capital gains are typically considered to retain the characteristics in the hands of the beneficiary. In Australia, as in New Zealand, beneficiaries are generally only taxable on current year income distributed to the extent they are resident in the country, or the income is sourced from that country.

This premise was tested in relation to capital gains in the recent decided [Greensill Case](#). Briefly, the facts of this case involved:

- a discretionary trust (the Trust);
- a trustee, who was an Australian tax resident; and a
- beneficiary, who was tax resident in the UK;

Broadly, the Trust made capital gains in 2015-2017 from disposal of shares in Greensill Capital Pty Ltd of AU\$58million. Greensill Capital Pty Limited was an Australian financial services company which owned Greensill Capital Management Company (UK) Limited, Greensill Capital (UK) Limited and other entities both in Australia and overseas.

All of the capital gains were distributed to the beneficiary, Alex Greensill, who was living in the UK and classed as non-resident for tax purposes in Australia. The shares in Greensill Capital Pty Ltd disposed of by the Trust were not taxable

Australian property, broadly speaking, on the basis that neither Greensill Capital Pty Ltd nor its subsidiaries owned any material Australian real property.

Ordinarily (and leaving aside the trust related complications), a capital gain on non-taxable Australian property made directly by a non-resident is disregarded for Australian tax purposes. However, in the case of a non-resident beneficiary being distributed gains in respect of the disposal of non-taxable Australian property, the Federal Court of Australia determined there was no exemption available because of the specific codified provisions that deal with trusts and capital gains. The consequence was that the Australian trustee was required to pay income tax on behalf of the non-resident beneficiary in respect of the capital gain on the disposal of the non-taxable Australian property.

The Greensill case determined that unlike the exclusion for foreign sourced income distributed to foreign beneficiaries, there is no such exemption for capital gains. Instead, the trustee is treated as being the recipient of the capital gain amounts irrespective of where the gain is sourced.

You might say why would we be concerned about this in New Zealand? Isn't this a rare issue or shouldn't it only apply to Australian shares? Let us take a simple set of facts to illustrate this:

A New Zealand resident (settlor) settles a trust, the trustee of which is a Trustee company controlled by the settlor. The trust holds investment properties in New Zealand for the benefit of the settlor's adult children who all live in New Zealand. At some stage after settling the property, the settlor moves to Australia but continues to be a director of the Trustee company. The Trust may therefore become tax resident in Australia at this point by virtue of the company trustee becoming Australian resident.

Each year investment income is derived and distributed to the children. This is not taxable in Australia as it is foreign (New Zealand) sourced income distributed to foreign (New Zealand) beneficiaries. However, in 2021, the properties are sold, there are capital gains derived of NZ\$30million and the Trustee resolves to distribute these to the New Zealand resident beneficiaries.

The Greensill case determined that unlike the exclusion for foreign sourced income distributed to foreign beneficiaries, there is no such exemption for capital gains. Instead, the trustee is treated as being the recipient of the capital gain

amounts irrespective of where the gain is sourced. Given the gains are then distributed to the New Zealand resident beneficiaries, Australian tax is deemed payable by the trustee on their behalf. The result of this is that the New Zealand resident beneficiaries are subject to Australian tax at non-resident tax rates (between 32.5% and 45%) on capital gains derived from New Zealand property. This would not have been the case if the New Zealand resident beneficiaries had held this property directly or if the New Zealand settled trust had retained a New Zealand resident trustee after the migration of the settlor to Australia.

There is an interesting question as to whether there could be relief under the New Zealand-Australia Double Tax Agreement but in the Greensill matter, the treaty analysis in the context of the Australia / UK treaty was not considered by the courts.

We frequently see clients move to Australia without considering the implications for their New Zealand settled trusts. This serves as a big warning regarding inadvertent implications that can arise if you do move to Australia and remain a trustee of a trust. Changing the trustee at a later point can also give rise to a deemed capital gain on the appreciation in value over the time the trust had a resident trustee.

The key learning is to ensure you obtain full advice before moving overseas while holding assets in trusts.

Please contact your usual Deloitte advisor for more information.

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The property parent trap

By Robyn Walker & Susan Wynne



“The Government is aware of other transactions that can result in an income tax liability arising under the bright-line test, often in the context of family arrangements where the taxpayer is not aware of the potential tax consequences of their actions. For example, parents may help their children onto the property ladder by gifting them residential land or selling it to them at cost. Under the Income Tax Act 2007, section GC 1 deems these transactions to occur at market value. This is an important feature of New Zealand’s tax system to ensure integrity and fairness. However, it can create cash-flow difficulties when an income tax liability arises under the bright-line test.”

The quote above came from the June 2021 [discussion document](#) on the design of interest limitation and additional bright-line

rules, and possibly may have been the first time alarm bells started to ring for a number of taxpayers who have entered into co-ownership arrangements when buying land.

As highlighted, a common scenario is where parents help their adult children to buy a house. This could be by buying the property and gifting it to them, or becoming co-owners and progressively having their ownership interest bought out. Each of these scenarios could result in an unexpected tax bill.

What are the key rules to be aware of?

In many instances the key issue to be aware of is the application of the “bright-line test”. This rule taxes residential land sales when a property is sold within the bright-line period and no other land sale rules are

already taxing the property. The relevant bright-line period depends on when the property was acquired; acquisitions between 28 March 2018 and 26 March 2021 are subject to a 5-year bright-line period, and acquisitions from 27 March 2021 are subject to a 10-year bright-line (unless the property is a ‘new build’, in which case a 5-year period applies).

The bright-line test will tax the income arising from the sale, with an allowance to deduct the costs of the property.

There is an exemption from the bright-line test when the property has predominantly been used as the main home of the person who is disposing of the property.

When there are changes in the ownership of a property, such as changes to the

It's important whenever you're purchasing property to consider the tax consequences of any anticipated future transactions.

proportionate ownership shares in a property this may result in a disposal and reacquisition by all the co-owners. This can result in a tax liability and restarting the bright-line test period at 10-years again. The outcomes in relation changes in co-ownership are highlighted in a [draft interpretation statement](#) issued by Inland Revenue.

If land is sold (or gifted) at an amount below its market value when it would otherwise be subject to tax (e.g. it is sold within the bright-line period), then the transaction will be deemed to take place at the market value of the property at the time of disposal.

It is also worth being aware that if children will be contributing towards the house and paying rental income to their parents (either directly or by paying parents mortgage costs) that this may create additional tax compliance obligations for the parents. Recipients of rental income will need to return this income and consider the [residential ring fencing rules](#) and the newly introduced [interest limitation rules](#).

What does this mean in practice?

If a parent owns either all or part of a property which is being occupied by an adult child and subsequently gifts or sells the property to the adult child, the bright-line test will potentially create a tax liability for the parent based on the market value of the property (regardless of the amount paid for the property by the adult child). As the parent won't have been living in the property the main home exemption will not apply to relieve the parent from tax.

If an adult child is progressively buying out a parent's ownership interest in the property, each payment could technically trigger a tax obligation. Both parties will be treated as having reacquired their interests in the land each time there is a change in the land title under the Land Transfer Act 2017.

Example

In December 2018, Michaela and Daniel brought a property as tenants in common with their adult son Cameron. The property cost \$500,000. Michaela and Daniel own $\frac{1}{2}$ and Cameron owns $\frac{1}{2}$. Michaela and Daniel were required to become co-owners of the land in order for Cameron to secure a mortgage. In October 2021 Cameron come into some money and decides to use this to buy-out part of Michaela and Daniel's interest in the property. Michaela and Daniel agree that Cameron can buy one half of their interest in the property at cost. Cameron pays \$125,000 and now has a $\frac{3}{4}$ interest in the property. In February 2024, Cameron has met a partner and they are having a child together. At this point, Michaela and Daniel decide to gift their remaining interest in the property to Cameron.

- The sale of the $\frac{1}{4}$ interest in the property in October 2021 will cause Michaela and Daniel to have income under the bright-line test based on the market value of the property at that time (this will likely be an amount which is higher than the \$125,000 received from Cameron).
- In October 2021 the bright-line period will restart again for Michaela, Daniel, and Cameron. The new bright-line period will be 10 years.
- When the remaining $\frac{1}{4}$ interest is gifted to Cameron in February 2024, this will again result in a bright-line disposal for Michaela and Daniel based on the market value of the property at that time. The bright-line period will once again reset at 10-years for Cameron (noting that if he were to subsequently dispose of his interest in the property, he may be able to use the main home exemption).

The example above is adapted from examples contained in the Inland Revenue draft interpretation statement.

The outcomes above may be surprising and feel like the incorrect outcome when a parent is helping their children. It's important whenever you're purchasing property to consider the tax consequences of any anticipated future transactions. There may be options to structure the arrangement in another way (for example by a loan between the parties rather than co-ownership of the land), but in some instances this may be constrained by what is acceptable to the third-party bank providing a mortgage over the property.

Submissions can be made on the draft interpretation statement until 9 November 2021.

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PAYE and NRCT simplification coming for cross-border workers

By Jayesh Dahya and Charlotte Monis



Managing Pay As You Earn (PAYE) or withholding tax obligations for cross-border workers has always been fraught with difficulty.

Foreign employers and New Zealand businesses who bring workers to New Zealand often face uncertainty in managing their tax obligations. These uncertainties include whether there is a need to register for PAYE, for example, foreign employers may not know at the outset whether their workers will be subject to New Zealand tax as they may qualify for an exemption. Likewise, it is often unclear at the outset whether non-resident contractor withholding tax (“NRCT”) needs to be deducted from payments to contractors coming to work in New Zealand. Many tax obligations are triggered if a person is in New Zealand for more than 92 days in a 12-month period (using domestic law) or

more than 183 days (when considering double tax agreements).

Concerns have been raised that if the day count test is breached, the retrospective effect of the test results in the worker being subject to income tax from the first day of their presence in New Zealand. This means foreign employers and New Zealand businesses face additional compliance costs to correct the tax position and can potentially incur penalties and use of money interest charges.

Remote work arrangements have heightened these concerns as foreign employers often do not have a presence in New Zealand and many may not have systems to manage their employee tax obligations in New Zealand.

What are the proposals?

To address these concerns Inland Revenue has released an Officials Issues Paper “[Cross-border workers: issues and options for reform](#)” with a range of proposals aimed at providing greater certainty for foreign employers and New Zealand businesses who engage cross-border workers.

These proposals include:

- Introducing flexible PAYE arrangements for employees who remain on a foreign payroll.
- Clarifying when PAYE, FBT and ESCT obligations arise for non-resident employers and when these obligations transfer to the employee.
- Allowing non-resident employers to transfer PAYE, FBT and ESCT obligations to a related New Zealand entity.

- Changing the NRCT withholding thresholds to a “single” payer requirement, introducing a non-resident contractor reporting requirement and making NRCT more flexible.
- Taxing contributions to foreign superannuation schemes under the PAYE regime rather than the FBT regime.
- Repealing the PAYE employer bond provisions as these are rarely used.

Flexible PAYE arrangements Catch up payments

Inland Revenue is proposing to allow “catch up payments” to be made for employees on a foreign payroll where an employee breaches the day-count threshold (92 days/183 days), provided the employer reasonably believed that an exemption would apply.

This removes the penalty and interest exposures that typically arise once these breaches are discovered and will reduce the compliance costs associated with remedying the positions.

The employer will have 28 days to correct the position once the employer first becomes aware that this day count

threshold has been breached. Our experience suggests that it may be difficult to meet the 28-day requirement. In practice, there can be delays with obtaining Inland Revenue numbers for cross border employees who may not have or do not intend to open New Zealand bank accounts, meaning that it could be difficult to meet the 28-day requirement. The additional time it may take to collect compensation information from outsourced service centres and for this information to then be provided to local country payrolls should also not be underestimated. This is something that requires further consideration.

It is also proposed that this flexibility should also be available to New Zealand businesses who make payments to non-resident contractors, as similar issues arise when it subsequently transpires NRCT obligations arise due to a change in circumstances.

Inland Revenue example:

Estella, a Brazilian tax resident, comes to NZ on a ten-week assignment (70 days) to work on a construction project. A New Zealand company manages the project and takes

responsibility for the employees. At the outset of Estella’s assignment, it is anticipated that the 92-day exemption under New Zealand domestic law will apply. New Zealand does not have a double taxation agreement with Brazil.

Unfortunately, two weeks after Estella’s arrival, the project managers are told that equipment necessary to complete the work Estella is undertaking will be delayed arriving in New Zealand. This delay means that Estella’s time in New Zealand will extend to 14 weeks (98 days). At this point, the New Zealand company expects the threshold to be breached so it puts Estella on the shadow payroll. A catch-up PAYE payment for the first two weeks is made, and PAYE is applied thereafter.

PAYE arrangements and in year square ups

Inland Revenue has recognised that there are complexities involved with cross-border worker arrangements. Tax equalisation arrangements, gross up calculations, collecting and reporting employment information and foreign exchange all make it difficult when managing PAYE obligations for workers on a foreign payroll.



Inland Revenue has recognised that there are complexities involved with cross-border worker arrangements. Tax equalisation arrangements, gross up calculations, collecting and reporting employment information and foreign exchange all make it difficult when managing PAYE obligations for workers on a foreign payroll.

To address these issues, two options have been proposed:

In-year square ups	Employers will be allowed to make adjustments during the year and make a catch-up payment. Final adjustments to be made in the employee's tax return.
PAYE arrangements	Employers enter into a PAYE agreement with Inland Revenue. The agreement is subject to certain conditions, such as being tax equalised with an in-year review to capture material changes. Final adjustments to be made in the employee's tax return. This method is currently available to non-resident employers in special circumstances. The current proposal is to clarify when these arrangements can be applied to cross border workers. However, as PAYE arrangements result in both set up and ongoing costs to monitor and administer the arrangements, Inland Revenue have signalled that the PAYE arrangements is not the preferred option, but they welcome feedback on this.

Non-resident employers' obligations to deduct PAYE, FBT and ESCT

In July 2020, Inland Revenue released a draft operational statement ED0223 "[Non-resident employers' obligation to deduct PAYE, FBT and ESCT in cross-border employment situations](#)" for consultation. Our [August 2020 Tax Alert](#) article also discussed some of the tax implications of ED0223.

Whether an obligation to deduct exists turns on the question of whether a non-resident employer has a "sufficient presence in New Zealand".

Summary of position outlined in ED0223:

Sufficient presence in New Zealand	Requirement to account for PAYE, ESCT & FBT
Yes	Yes
No	No

Inland Revenue has noted that some submissions viewed the sufficient presence test as "vague and uncertain". In response, feedback is sought on whether a threshold test that demonstrates a "sufficient presence" is desirable. If so, the proposed threshold test would be the lower of:

- NZD500,000 of gross employment-related taxes per current tax year, or
- Five employees present in New Zealand (including full- and part-time employees, whether they are tax resident in New Zealand or not).

Inland Revenue has made it clear that the proposed threshold test would not replace the sufficient presence test, rather it would support the analysis. What follows from this is that regardless of whether the employer has a sufficient presence in New Zealand, the employer would always have an obligation to apply the PAYE, FBT and ESCT rules if the threshold test was met. It is difficult to see how New Zealand's taxing jurisdiction could be asserted over a non-resident employer who breaches this threshold test but has no other presence in New Zealand.

PAYE, FBT and ESCT obligations where there is no sufficient presence in New Zealand.

If a non-resident employer does not have a sufficient presence in New Zealand, Inland Revenue is proposing that non-resident employers could choose to transfer their PAYE, FBT and ESCT obligations to a related New Zealand local entity. The New Zealand entity would have joint and several liability for these obligations and would need to notify Inland Revenue that they are acting as agent for the non-resident employer.

If the non-resident employer chooses not to transfer the obligations to a related New Zealand local entity or there is no such entity, currently there is a secondary liability for PAYE on the employee.

If a non-resident employer does not have a sufficient presence in New Zealand, Inland Revenue is proposing that non-resident employers could choose to transfer their PAYE, FBT and ESCT obligations to a related New Zealand local entity.

This means the employee is personally required to meet their PAYE obligations. This is achieved by registering the employee as an "IR 56 taxpayer"; those working in New Zealand on a remote basis will already be familiar with this process.

The requirement to register as an IR 56 taxpayer will be made clearer. This requirement will also be extended to include FBT and ESCT. Currently, there is no provision for an employee to pay FBT and ESCT and these proposals will mean that employees will also become personally responsible for these costs. Unlike PAYE, FBT is an employer tax and unless there are arrangements with employers to address these liabilities, employees could be liable for tax on any benefits that may be provided.

Inland Revenue has suggested that PAYE flexibility should not be extended to IR 56 taxpayers. Hopefully, we will see a shift in Inland Revenue thinking on this point to recognise that remote workers are also on foreign payrolls and have the same risks regarding breaches of the day-count tests.

NRCT proposals

NRCT has long been a bugbear of business. In recognition of this, Inland Revenue are proposing various measures to assist businesses with their NRCT obligations. These measures include:

- Moving to a "single payer" view when determining whether NRCT exemptions apply (the 92-day test or the NZD15,000 de minimis test) and introducing additional reporting requirements to enable Inland Revenue to identify non-resident contractors. Currently, businesses need to seek details from non-resident contractors regarding their historical presence in New Zealand

(including how many days they have been in New Zealand in a 12-month period and whether the contractor has received other payments up to NZD15,000 within the last 12 months), a business is liable for NRCT if the thresholds are breached based on other activity the contractor has had in New Zealand.

- Introduction of an NRCT code to identify NRCT payments allowing catch up payments to be made in the event of threshold breaches, provided reasonable steps have been taken to confirm the NRCT thresholds would not be exceeded.
- Allowing for the issue of retroactive certificates of exemption that would cover payments made up to 92 days before the issue of the certificate of exemption.
- Providing broader exemption certificates for up to two years where they are issued on the basis of a good compliance history.
- Enabling a New Zealand entity to act as a "nominated taxpayer" to establish good compliance history to obtain exemption certificates.
- Establishing a register of exempt non-resident contractors.

Our view

Overall, the proposals regarding PAYE and NRCT flexibility for cross-border workers are positive and should simplify some of the current difficulties when thresholds are breached. The proposed threshold test to determine "sufficient presence" for non-resident employers requires further consideration in terms of whether this addresses the uncertainties that have raised. While the extension of the IR 56 regime to include FBT and ESCT closes a gap in the current legislation, this does

create some difficulties as the employee will need to fund these costs from their after-tax earnings.

Submissions on the issues paper close on 19 November 2021.

Please get in touch with your usual Deloitte advisor if you would like to discuss how these proposed changes may apply to you.

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Are my debt levels subject to the Arm's Length Test?

By Bart de Gouw, William Dawson & Chanelle Stoyanov



Cross-border financing continues to remain a key focus of the Inland Revenue, as it maintains a close watch on all cross-border financing arrangements between associated parties, especially inbound loans in excess of NZD10 million in principal, due to the application of the restricted transfer pricing regime to these loans.

Transfer pricing of financing arrangements has historically focused on determining the arm's length nature of the interest rate applicable to intercompany loans. However, recently there has been a global shift to scrutinise whether the **amount** of intercompany debt advanced is comparable to what third party

borrowers would borrow in a commercial arrangement.

In a third-party context, companies are incentivised to maintain a certain level of equity to keep the cost of borrowing down and maintain the lowest possible weighted average cost of capital. However, where the shareholder is lending to its subsidiary, this commercial tension is absent. Since the shareholder will receive funds either as interest or dividend, groups may be incentivised to gear as highly as possible (maximising interest expense) if the lender's jurisdiction has a lower tax rate than the borrower's jurisdiction.

Earlier this year, several changes were proposed by the Organisation for

Economic Co-operation and Development ("OECD") to the commentary on Article 9 (Associated Enterprises) of the Model Tax Convention. The draft commentary clarifies that an arm's length debt quantum is within the ambit of Article 9. Once the draft commentary is finalised, Inland Revenue will have enhanced ability to challenge the arm's length nature of debt quantum, and we could well see Inland Revenue begin to challenge interest deductions on the basis that the taxpayer has a debt levels in excess of an arm's length amount.

New Zealand's thin capitalisation restrictions will typically kick-in to deny interest expenditure where the 60% interest bearing debt-to-net asset



threshold has been breached. On this basis many groups will debt fund NZ subsidiaries to be within the thin capitalisation limits. We have not yet seen incidences of Inland Revenue challenging interest deductions of taxpayers that are within thin capitalisation limits on the basis that the taxpayer is excessively geared, however the revised commentary may see this change.

The restricted transfer pricing rules are triggered when a New Zealand borrower with inbound debt in excess of NZD10m has a debt percentage that is greater than 40%. The fact that a 40% threshold was set (i.e. well below the thin capitalisation threshold of 60%) is a key indicator that Inland Revenue does consider debt capacity to be a continuing issue and are concerned with debt capacity in the matter of cross-border financing.

Where taxpayers have some level of related party debt financing, we recommend the level of debt-to-equity is assessed against comparable independent companies to sense check the level of debt is not excessive for the taxpayers particular circumstances (for example the specific industry, business cycle and cashflow projections).

Where taxpayers have some level of related party debt financing, we recommend the level of debt-to-equity is assessed against comparable independent companies to sense check the level of debt is not excessive for the taxpayers particular circumstances (for example the specific industry, business cycle and cashflow projections).

If you would like to discuss any of the above in more detail, please contact your usual Deloitte advisor or Deloitte's specialist transfer pricing team.

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Updated political agreement on global tax reform

By Annamaria Maclean & Jeremy Beckham



In July 2021, the Organisations for Economic Co-operation and Development (OECD) and Group of Twenty (G20) Inclusive Framework on BEPS (Inclusive Framework) released a statement on a two-pillar solution to address tax challenges arising from the digitalisation of the economy. The July statement determined that both the Pillar One and Pillar Two proposals will come into effect in 2023 but certain key design elements and a detailed implementation plan were left open to be agreed at a later time. On 8 October, the Inclusive Framework released a further [statement](#) finalising these details.

You can find detailed commentary on this latest statement including Pillar One and Pillar Two highlights [here](#) (or if you prefer feel free to listen to this excellent [podcast produced by Deloitte US](#)). We have summarised below some of the main takeaways that New Zealand taxpayers should be aware of.

Additional details that have been agreed

A number of the key building blocks that will form part of the Pillar One and Pillar Two architecture were agreed as part of the October statement released by the Inclusive Framework. Key among these are:

- The amount of residual profit to be re-allocated to market jurisdictions above a deemed routine return of a 10% profit margin on sales under Amount A of Pillar One has been set **at 25%**.
- The agreed rate of minimum tax for Pillar Two's Global anti-Base Erosion (GloBE) rules will **be 15%**.
- The rate for the Subject to tax Rule (STTR) is agreed at **9%**. This is an enhanced taxing right for developing countries.

Of the above, the proposal that is expected to have the biggest impact on New Zealand taxpayers is the minimum tax under Pillar Two, noting this will apply to multi-national enterprises (MNEs) with turnover above EUR750 million.

In respect of Pillar One, only MNEs with a global turnover above EUR20 billion (reducing to EUR10 billion after 8 years) and profitability above 10% will be in scope of the Amount A residual profit reallocation (we note though that the simplification of the application of the arm's length principle under Amount B may still be relevant).

Further, the STTR is only expected to be implemented into double tax agreements with developing countries where the other country has nominal corporate tax rates below 9% applying to interest, royalties or a to-be defined set of other payments. This may have limited application to New Zealand's tax treaty network given New Zealand taxes most forms of income at the company tax rate of 28%.

Agreement on unilateral measures

A multilateral convention (MLC) will require all parties to remove all Digital Services Taxes (DSTs) and other relevant measures with respect to all companies (not just those within scope of Pillar One Amount

Although the timeline is ambitious, the OECD is expected to deliver to this timeline and the two-pillar solution has now achieved a significant amount of political support and consensus.

A). Further, members of the Inclusive Framework have committed not to impose any newly enacted DSTs (or other relevant similar measures) on any company until the earlier of 31 December 2023 or the coming into force of the MLC. This will give time for the two-pillar solution to be built into the international tax framework. Separately, we note that a transitional approach has been agreed in relation to existing unilateral measures in a [joint statement](#) by certain Inclusive Framework members reflecting a compromise reached.

Readers may recall that the New Zealand Government set out a framework for a DST in 2019. Interestingly, the Government has not yet issued a formal statement taking the DST off the table. We understand the view of some tax authorities is that countries are still free to legislate for a DST so long as taxes are not imposed (pending progress on Pillar One within the timeline mentioned above).

Release of the detailed implementation plan

The October statement includes a detailed implementation plan that

retains the same ambitious timeline for implementation of the two-pillar solution in 2023. Refer to the table below for the key milestones going forward.

The statement notes that the Inclusive Framework will continue to progress this work in consultation with stakeholders, however this will need to occur within the constraints of the timeline set forth in the implementation plan. Given the volume of technical work that is left to be undertaken this may limit the opportunities for businesses to be consulted on the detailed technical provisions before they are implemented.

The time to prepare is now

Although the timeline is ambitious, the OECD is expected to deliver to this timeline and the two-pillar solution has now achieved a significant amount of political support and consensus. While there are several important obstacles remaining (including consideration by US Congress), New Zealand taxpayers should be thinking now about how the two-pillar solution will impact their businesses and operations. Deloitte can assist with

modelling the impact of these changes to help you assess and evaluate the potential future implications of Pillar One and Pillar Two. Further information on our Deloitte modelling can be found [here](#). We can also help you understand the future impact of the proposed Pillar One and Pillar Two changes on any investment and business decisions you are making today.

If you would like to know more please contact your usual Deloitte Tax Advisor.

Pillar One	Pillar Two
Early 2022 – Text of a Multilateral Convention (MLC) and Explanatory Statement to implement Amount A of Pillar One	November 2021 – Model rules to define scope and mechanics for the GloBE rules
Early 2022 – Model rules for domestic legislation necessary for the implementation of Pillar One	November 2021 – Model treaty provision to give effect to the subject to tax rule
Mid 2022 – High-level signing ceremony for the Multilateral Convention	Mid 2022 – Multilateral Instrument (MLI) for implementation of the STTR in relevant bilateral treaties
End 2022 – Finalisation of work on Amount B for Pillar One	End 2022 – Implementation framework to facilitate co-ordinated implementation of the GloBE rules

2023 – Implementation of the Two-Pillar Solution

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Operational Taxes update: New W-8 series forms – are you ready?

By Troy Andrews, Vicky Yen & Sam Kettle



The US Internal Revenue Service (IRS) has recently released new versions of certain W-8 series forms and instructions.

These forms are used by financial institutions to obtain self-certifications from account holders on their tax residency status and eligibility to claim treaty benefits under a U.S double tax agreement, and also to be documented for FATCA. These forms are used by financial institutions around the world, including in New Zealand (especially if they are a Qualified Intermediary). To date, new versions (Rev. October 2021) of Forms W-8BEN-E, W-8ECI,

and W-8BEN and instructions have been released. The new version of Form W-8IMY is currently still in draft.

From 1 May 2022, financial institutions will only be able to accept the new Rev. October 2021 versions of these forms. Until then, the previous version can still be completed by account holders and accepted by financial institutions, these continue to be valid until their expiration date, or until a change in circumstances causes them to become invalid, under the usual validity rules.

Financial institutions should take immediate steps to prepare for transition to the new forms, including:

- Agreeing within the business on a transition timeline (when to stop sending out, and when to stop accepting the prior versions of the forms).
- Updating documentation collection and review / validation procedures. These procedures generally sit outside the tax function, so may require communication with a broad range of stakeholders including client onboarding teams and third-party service providers.



- Updating internal controls (whether manual or automated), and customer relationship management systems or other relevant systems' data fields.
- If substitute Forms W-8 are utilised (forms which are "substantially similar" to the official forms issued by IRS) these should be updated to ensure they remain compliant.

Key changes between the versions have been summarised in IRS's new form instructions. These include updated disclosure options on jurisdictions where foreign Tax Identification Numbers are not legally required, persons who are completing the form on behalf of others, and jurisdictions without a limitation on benefits article in the relevant US treaty. The form instructions also provide updated guidance on electronic signatures, withholding in relation to transfers of interest in publicly traded partnerships, and on claiming treaty benefits for profits or gains not attributable to a permanent establishment.

Financial institutions should review the updates and ensure their relevant teams have a good understanding on the changes and their impact. This may also be a good opportunity for financial institutions to perform a wider review of their policies and procedures to ensure compliance on account holder documentation collection, validation, monitoring, and reporting for FATCA / CRS and Qualified Intermediary purposes.

If you require any assistance in this area or have questions regarding the updated Forms W-8, please contact the Deloitte team.

Financial institutions should review the updates and ensure their relevant teams have a good understanding on the changes and their impact.

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Snapshot of recent developments



COVID-19

Applications are open for the sixth round of the Wage Subsidy

The [sixth round](#) of the Wage Subsidy opened for applications on 29 October 2021, and will remain open until 11 November 2021. The revenue decline test period under this round needs to be measured over the 14-day consecutive period from 26 October 2021 to 8 November 2021. All other eligibility criteria remain unchanged from the previous round. For further details about the Wage Subsidy please read our September Tax Alert Article [here](#).

Resurgence Support Payment Scheme updates

To date, the Government has made four payments available for the August 2021 activation of the [COVID-19 Resurgence Support Payment](#) (RSP). On 2 November the Inland Revenue announced a change to the application period for the first three payments. The required revenue decline test period and the deadline of making an application for each payment are summarised below:

- For the first payment, the seven-day period of revenue decline must fall within 17 August 2021 and 1 November 2021. Applications are open until 1 December 2021.
- For the second payment, the seven-day period of revenue decline must

fall within 8 September 2021 and 1 November 2021. Applications are open until 1 December 2021.

- For the third payment, the seven-day period of revenue decline must fall within 1 October 2021 and 1 November 2021. Applications are open until 1 December 2021.
- For the fourth payment, the seven-day period of revenue decline must start on or after 22 October 2021 and end immediately before all areas of New Zealand return to Alert Level 1. Applications for this payment will close on the first working day that is one month after a nationwide return to Alert Level 1.

Further, on 22 October 2021 the Minister of Finance Hon Grant Robertson [announced](#) the Government will increase the amount and frequency of the [RSP](#). After the fourth grant payment the RSP will increase to a fortnightly payment of \$3,000 per eligible business and \$800 per FTE, up to 50 FTEs or NZD43,000. The first RSP under these changes will open for application on 12 November 2021. Other eligibility criteria remain unchanged. A [Deloitte article](#) has covered more information on the update of the Scheme.

\$60m fund for business advice and mental health support

The second element of the Business Boost [announced](#) on 22 October 2021 by the Minister of Finance is a \$60m fund

for business advice and mental health support in Auckland. Through the [Regional Business Partner Network](#) businesses will be able to apply for grants of up to \$3,000 worth of advice and planning support and then up to additional \$4,000 to implement that advice. Grants are not required to have a matching contribution from businesses. Ten million dollars is being provided for mental health and wellbeing support to small businesses. This will be delivered through a programme being developed with the EMA and Auckland Business Chamber of Commerce.

Additional business support under the new COVID-19 protection framework

Also on 22 October 2021, the Minister of Finance [advised](#) that Cabinet had made in-principle decisions on financial support which will become available when the new [COVID-19 Protection Framework](#) takes effect. The Minister will take a paper to the Cabinet in November confirming the details of the support, and any other outstanding decisions relating to the transition. An overview of the proposed support plan has been provided as follows:

- A transition grant will be made available to support, particularly Auckland, businesses when they move into the new framework. The grant will be based on similar criteria to the RSP.
- Once the framework is fully operational across New Zealand, the current support



schemes will be replaced with something to better reflect the new framework. This new financial support should target the most affected businesses when areas of the country are in “red”. The Government is still considering what, if any, financial support is appropriate for businesses who choose not to be part of the vaccine certificate regime.

- Across the board support will not be provided for areas designated as “orange” or “green”.
- Potential support to be provided in the event of local lockdowns is still being discussed.
- The ongoing support for people to isolate because of being exposed to COVID-19 or being tested will continue, regardless of location.

Tax Legislation and Policy Announcements

Order in Council extending October filing due dates

The [Tax Administration \(Extension of Due Dates\) Order 2021](#) extends the due dates for the filing of tax returns and the payment of tax (including provisional tax and GST) originally due on 28 October 2021 to 4 November 2021. This Order

was issued due to the Inland Revenue’s system shutdown which made filing by 28 October 2021 difficult. The Order came into force on 21 October 2021.

Officials’ enforcement and review on FBT treatment of work-related vehicles

The Minister of Revenue Hon David Parker recently provided answers to the parliamentary written questions on the enforcement and review for the Fringe Benefit Tax (FBT) treatment of the work-related vehicle exemption. The Minister has been advised by officials that [compliance work](#) is underway for FBT as part of their normal compliance programme, and the Business Transformation project now allows Inland Revenue to use extensive data analytics to identify FBT issues. The work has however been paused temporarily as Inland Revenue’s immediate priority has been supporting taxpayers through the recent COVID-19 response. In addition, there are currently [three FBT projects](#) underway on the treatment of work-related vehicle, including a stewardship review, expected to be completed by the end of the year which may inform future policy or operational work programmes; a project monitoring FBT and compliance areas for risk; and a general review of the policy settings and

definition of work-related vehicle. A report back to the Minister is expected in the first half of 2022, following the completion of the regulatory stewardship work. Any proposed legislative change that may result from this review would generally follow the Generic Tax Policy Process which involves opportunities for public comment and consultation, often through an issues paper which would set out the reasoning behind any proposed changes. You can read more about FBT and work related vehicles [here](#).

Order bringing Budget’s Child Support Amendments into force

[The Taxation \(Budget 2021 and Remedial Measures\) Act 2021](#) which received royal assent on 24 May 2021 contains remedial measures on the Child Support Act 1991 regarding penalties for late payment of financial support debts. The recently published [Taxation \(Budget 2021 and Remedial Measures\) Act Commencement Order 2021](#) brings these measures into force from 1 November 2021.

NZ secures free trade agreement with UK

On 20 October 2021, NZ and the UK [reached Agreement](#) in Principle (AIP) on the key elements of a new high quality, comprehensive and progressive free



trade agreement (FTA). The AIP confirms the parameters of the deal but does not create any legally binding obligations as work is continuing to finalise the legal text of the FTA. Once the text has been finalised and legally verified, and domestic approval processes have been completed, arrangements will be made for the signing of the FTA. New Zealand and the UK have been in the process of negotiating a new Double Tax Agreement (DTA) for a number of years; there has been no update on the progress of this.

Transition to new KiwiSaver default providers

In September 2021, the Government finalised KiwiSaver (Reallocation and Transfer of Default Members) Regulations 2021 which came into force on 1 November 2021. [Default KiwiSaver members](#) who are with one of the five default providers that have not been re-appointed will be transferred to a new default provider from 1 December 2021. The regulations ensure all KiwiSaver default members of outgoing providers are transferred safely and securely to the new default funds. A [fact sheet](#) is available for more information.

Inland Revenue statements and guidance

Tax payments - when received in time

On 6 October 2021, Inland Revenue issued [SPS 21/03](#) - Tax payments - when received in time. This standard practice statement updates and replaces SPS

20/04 Tax payments – when received in time, reflecting the removal of cheque exception arrangements as a payment method option, effective from 1 March 2021, as New Zealand banks phase out the use of cheques.

Variation to extend R&D general approval application filing deadline

On 15 October 2021, Inland Revenue published COVID-19 variation [COV 21/04](#) - Variation to section 68CB(2) of the Tax Administration Act 1994. For the 2020-21 income tax year, the time by which an application must be filed has been extended by three months using s 6I of the Tax Administration Act 1994 in [COV 20/10](#) - Variation to section 68CB(2) of the Tax Administration Act 1994. That variation did not however provide the same level of extension to applicants with balance dates of 31 May 2021 or later, because the Commissioner's variation power in s 6I was to expire on 30 September 2021. The application of s 6I has now been extended to 30 September 2022, as such, the Commissioner has now issued a variation to ensure that applicants with balance dates of 31 May 2021 or later are entitled to the full three months extension of time, on the same conditions. This variation applies from 1 October 2021 to 31 March 2022.

Amortisation rates for Landfill Cell Construction Expenditure

On 19 October 2021, Inland Revenue released draft Determination [ED00234](#) - Amortisation rates for Landfill Cell

Construction Expenditure, made pursuant to section [91AAN](#) (Determinations on rates for diminishing value of environmental expenditure) of the Tax Administration Act 1994. The Determination applies to taxpayers, who meet the criteria under section [DB 46](#) of the Income Tax Act 2007 and have incurred landfill cell construction expenditure in an income year starting on or after 1 April 2021. Its application may be supplemented or amended by supplementary Determinations pursuant to section 91AAN(6) of the Tax Administration Act 1994. This determination replaces DET 05/02. Submissions close on 30 November 2021.

Inland Revenue removed some calculators and tools from their website

As part of the final stage of Business Transformation, on 21 October 2021 Inland Revenue [removed](#) the following calculators and tools from their website:

- Depreciation claim calculator.
- Depreciation rate finder.
- Foreign Investment Fund (FIF) exemption check.
- Standard costs calculator for boarders and home-stay students.

New calculators are being developed, however there is currently no timeframe around this. In the interim, Inland Revenue will provide information on their website where the calculators were previously located to assist taxpayers to work out their obligations. The newly repaired FIF calculator remains in its same location on the Inland Revenue website (refer to our [previous article](#) about prior issues with the FIF calculator).

Child Support Employer Deduction notices in Inland Revenue's new system

Inland Revenue moved [child support](#) into their new system in late October as part of the final stage of Business Transformation. Inland Revenue will be able to access more up-to-date employment information which will allow more accurate calculations of child support amounts to be deducted from a liable parent's income. Some child support employer deduction amounts will change to reflect the up-to-date information. Inland Revenue

will notify employees and employers of any change by issuing new employer deduction notices from late October.

Business transformation final release has gone live

On 28 October 2021, the business transformation stage 4 release 2 (final release) has been completed and gone live, and Inland Revenue systems have reopened after this upgrade. [Business transformation webinar series](#) is available to help understand what's changed, including the myIR version upgrade, alerts, filing viewing and amending returns, managing profiles and logins in myIR and child support.

OECD updates

2021 peer review reports on country-by-country reporting

On 18 October 2021, the OECD released [Country-by-Country reporting - compilation of 2021 peer review reports](#). The annual peer reviews of the BEPS Action 13 Minimum Standard cover three key review areas: the domestic legal and administrative framework, the

exchange of information framework and the confidentiality and appropriate use of Country-by-Country (CbC) reports. The 2021 annual peer review is the fourth such review of the 132 member jurisdictions of the OECD/G20 Inclusive Framework on BEPS pertaining to the implementation of CbC reporting.

Progress on the Platform for collaboration on tax

On 20 October 2021, the OECD published the [Platform for Collaboration on Tax \(PCT\) Progress Report 2021](#). The PCT is a joint initiative of the IMF, OECD, UN and the World Bank. The report examines activities that the PCT has undertaken in five focus areas since July 2020: medium-term revenue strategies, COVID-19, tax and sustainable development goals, international taxation, and co-ordination. The new workstreams reflect the changing global tax landscape and the challenges of the pandemic for governments and policymakers as countries around the world try to balance the increased spending and lower revenues due to the COVID-19 crisis.

Deloitte Global News Focus

Deloitte's OECD Pillar One & Pillar Two tax advisory service

Deloitte Global has recently launched the [OECD Pillar One and Pillar Two tax advisory service](#), this offering combines the deep expertise of Deloitte tax specialists with the analytical power of our technology solution to help companies assess and evaluate the potential implications of Pillar One and Pillar Two on their tax profile. A [brochure](#) of the offering is available. For the latest updates on OECD Pillar One and Pillar Two, read this month's tax alert article and [Deloitte US tax insights](#).

Deloitte tax transformation trends survey on the future of tax talent

Deloitte has released the second report of the Tax Transformation Trends survey series - [Talent reimaged](#). The survey tapped into the perspectives of more than three hundred tax and finance leaders with a focus on talent transformation.

Note: The items covered here include only those items not covered in other articles in this issue of Tax Alert.



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